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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 271

CASSIUS MARSELLUS CLAY, JR.,
a/k/a MUHAMMAD ALI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-48a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1968. A petition for rehearing was denied on June 6, 1968. The petition for a writ of certiorari was filed on July 5, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the denial of petitioner's claims for Selective Service classification as a minister or conscientious objector had a basis in fact.

2. Whether reversal of petitioner's conviction was required because of alleged systematic exclusion of Negroes from membership on the local and state appeal boards which passed on petitioner's claims.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioner, a well-known, former world heavyweight boxing champion, was convicted of knowingly and wilfully refusing to submit to induction into the armed forces, in violation of 50 U.S.C. App. 462(b). On June 21, 1967, he was sentenced to five years' imprisonment and a $10,000 fine (R. 277-278).[1] The court of appeals affirmed (Pet. App. 2a, 48a, 49a).[2]

The wilful and knowing nature of petitioner's refusal to submit to induction as ordered on April 28, 1967—the sole issue which the jury had to decide—is not in dispute (see R. 108-111, 115-116, 123-124,

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[1] "R." refers to the record of proceedings at trial; "F." will refer to petitioner's Selective Service file; "H.Tr." will refer to the transcript of a hearing before a Department of Justice hearing officer relating to petitioner's conscientious objector claim. A copy of each of these documents is on file with the Clerk of this Court.

[2] The history of petitioner's prior court actions seeking to avoid induction and trial is set forth in chronological fashion in the court of appeals' extensive opinion (Pet. App. 7a-11a).

133-139). At issue, however, is the propriety of petitioner's Selective Service classification of I-A, which the trial judge determined, from a review of petitioner's Selective Service file (admitted into evidence at R. 139), had a basis in fact (see Pet. App. 50a-54a, for the district court's oral findings).[3]

Petitioner registered with local Selective Service Board No. 47 in Louisville, Kentucky, on April 18, 1960. On March 9, 1962, he was classified I-A. On March 26, 1964, he was classified I-Y (a person not currently qualified for military service who would be qualified in time of war or national emergency; see 32 C.F.R. 1622.17) after a physical and mental examination (R. 179). On February 17, 1966, he was reclassified I-A after being considered again under newly promulgated and revised regulations. On February 18, 1966, the notice of this classification was mailed to petitioner and he was furnished the special form for making a conscientious objector claim. On February 28, 1966, the completed form was received by the local board. Petitioner requested a personal appearance before the board in connection with the change in his classification from I-Y to I-A. On March 17, 1966, after a personal appearance, the local board again classified petitioner I-A. Petitioner took a timely appeal to the Kentucky Appeal Board, which

[3] The trial judge informed the jury of his finding and instructed that the correctness of petitioner's draft classification was not to be considered by it (R. 260-261). As the court of appeals pointed out, and petitioner presumably agrees, this approach "was in exact conformity with the Supreme Court's teaching in *Cox* v. *United States*, 332 U.S. 442, 452, 453 * * *" (Pet. App. 42a).

reviewed petitioner's file *de novo* and, on May 6, 1966, tentatively determined that petitioner was not entitled to I-O (conscientious objector) status or to any lower classification (R. 180). Pursuant to 32 C.F.R. 1626.25, the case was referred to a Department of Justice hearing officer, who concluded that petitioner was sincere in his conscientious objector claim (see F. 226-254). The Department of Justice Conscientious Objector Section reviewed the evidence and, on November 25, 1966, recommended to the Kentucky Appeal Board that petitioner's request for I-O status be denied (F. 209-225). A copy of the recommendation was mailed to petitioner. On January 10, 1967, the appeal board notified petitioner that he was classified I-A.

On August 23, 1966, petitioner wrote to his local board and asserted, for the first time, that he was entitled to a IV-D (ministerial) exemption because he was a minister of the Nation of Islam. He claimed that he had functioned in that capacity since early 1964, but had theretofore been unaware of his rights to exemption as such (F. 429). On January 12, 1967, after reviewing petitioner's file, the local board denied the claim for a IV-D exemption and declined to reopen his classification. Shortly thereafter, General Hershey, the National Director of Selective Service, requested the local board to reopen petitioner's classification. On January 19, 1967, the board did so and again classified petitioner I-A. Petitioner appealed this classification and asked that the Appeal Board for the Southern District of Texas (where he then resided) hear the appeal. On February 15, 1967, the

Texas Appeal Board classified petitioner I-A after considering the claims for I-O or IV-D status. On February 24, 1967, General Hershey appealed the classification to the National Selective Service Board (the Presidential Appeal Board).[4] On March 6, 1967, the Presidential Appeal Board voted to classify petitioner I-A.

On March 14, 1967, petitioner was ordered by Local Board No. 47 to report for induction at Louisville, Kentucky, on April 11, 1967. Petitioner obtained a transfer of his induction to Houston, Texas. On March 29, 1967, Local Board No. 61 in Houston ordered petitioner to report there for induction on April 28, 1967 (R. 143-152, 181-182). Petitioner reported but refused to submit to induction. His indictment, trial and conviction for violation of 50 U.S.C. App. 462(b) followed.

It was stipulated at trial that one of the three members of the Presidential Appeal Board was a Negro (R. 192). No other member of any Selective Service board which determined petitioner's classification was a Negro. All decisions to classify petitioner I-A by the various local and appellate boards, including that of the Presidential Appeal Board, were unanimous (see Pet. App. 21a-23a).

ARGUMENT

1. It is well settled that the standard for judicial review of Selective Service classifications is the narrow one of whether or not there is a "basis in fact"

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[4] Petitioner could not take such an appeal under the pertinent regulations, since the state appeal board's decision had been unanimous (see 32 C.F.R. 1627.1, 1627.3).

for the classification. *Estep* v. *United States*, 327 U.S. 114; *Witmer* v. *United States*, 348 U.S. 375. The grounds for denial of petitioner's claims for ministerial or conscientious objector status amply satisfy this standard.

a. As indicated previously, petitioner first asserted that he was entitled to a IV-D ministerial exemption by a letter to his local board in August 1966, wherein he stated that he had become a minister of the Nation of Islam in early 1964. He submitted affidavits attesting to his ministerial activities and contended that since early 1964 he had devoted only ten percent of his time to boxing and ninety percent to his ministerial duties (see R. 201; F. 412-432). Between 1964 and August 1966, however, petitioner had consistently described his occupation on Selective Service forms as "professional boxer." His Current Information Questionnaire dated February 2, 1966, listed his occupation as a professional boxer and his work as "professional fighting" (F. 532). In a letter to his local board claiming a hardship deferment on February 14, 1966 (three days prior to his reclassification from I-Y to I-A), petitioner stated: "My occupation is professional boxer, and I am at present the Heavyweight Champion of the World" (F. 525). On March 17, 1966, petitioner wrote a letter protesting his reclassification on the ground that it imposed a severe hardship upon him "as heavyweight champion of the world" (F. 491). On various dates in 1966, prior to his assertion of a ministerial exemption, he wrote letters seeking the permission of his local draft board to leave the country to defend his boxing title (F. 458, 467, 474).

Even after the date of making of his claim for a ministerial exemption, petitioner continued to list his occupation on Selective Service forms as a professional boxer or prizefighter (R. 237). On October 19, 1966, he wrote his local board requesting permission to travel to Mexico to make arrangements for a fight and to observe an opponent (R. 241; F. 260). In a letter to his local board on January 25, 1967, he stated that he was "now in training for my bout with Ernie Terrell here in Houston" (F. 164; see generally Pet. App. 52a-54a).

As the court of appeals concluded, there was not only a basis in fact for denial of the claimed ministerial exemption, but the record showed that petitioner's "vocation is clearly that of a professional boxer" (Pet. App. 34a). Moreover, there is nothing in the record to indicate that petitioner is the leader of a congregation or of a group of lesser members of his sect. As this Court has held, the ministerial exemption is applicable only to the "leaders of the various religious faiths and not * * * the members generally." *Dickinson* v. *United States*, 346 U.S. 389, 394.

b. Petitioner's claim to be "conscientiously opposed to participation in war in any form" (50 U.S.C. App. 456(j)) was first made on February 18, 1966, one day after his reclassification to I-A, at which time he was given the special form for conscientious objectors (see Pet. App. 34a-35a). In the completed form as returned, and at the hearing before the Department of Justice hearing officer, petitioner indicated that the source of his conscientious objection to war stemmed

from his adherence to the beliefs of the Nation of Islam, or Black Muslims, of which sect he became a member in January 1964 (F. 215-217; H. Tr. 116). Assuming the sincerity of the claim, despite its late interjection immediately following petitioner's reclassification to I-A (see *Witmer* v. *United States*, 348 U.S. 375), the information developed at the hearing concerning the tenets of the Black Muslim faith, and thus the asserted basis of petitioner's alleged conscientious objector status, furnished ample grounds for denial of his claim.

Significantly, it was shown that the Nation of Islam does not teach a general scruple against participation in war, but rather a refusal to fight in wars on the side of white persons. See *Sostre* v. *McGinnes*, 334 F. 2d 906 (C.A. 2), certiorari denied, 379 U.S. 892; *Quotations from the Supreme Wisdom Containing the Teachings of Elijah Muhammad*, set forth at Pet. App. 37a, n. 4. Moreover, in regard to his religious beliefs, petitioner himself stated (H. Tr. 111-112; Pet. App. 39a-40a, n. 18):

> * * * I wouldn't turn down so many millions and jeopardize my life walking the streets of the South and all of America with no bodyguard if I wasn't sincere in every bit of what the Holy Qur'an and the teachings of the Honorable Elijah Muhammad tell us and it is that we are not to participate in wars on the side of nobody who—on the side of non-believers, and this is a Christian country and this is not a Muslim country * * *. [T]he outright, everyday oppressors and enemies are the people as a whole, the whites of this nation. So, we are not, according to the Holy

> Qur'an, to even as much as aid in passing a cup of water to the—even a wounded. * * *

In answer to a hypothetical question, petitioner said that he would fight in a war if advised to do so by Elijah Muhammad, leader of the Nation of Islam (H. Tr. 117). He admitted being correctly quoted by a Chicago newspaper on February 18, 1966, as saying (Pet. App. 40a, n. 18): "I am a member of the Muslims and we don't go to no war unless they are declared by Ali himself. I don't have no personal quarrel with those Vietcongs." Plainly, there was ample basis for finding that petitioner did not have a conscientious scruple to participation in all wars, but only to certain wars depending upon particular circumstances. Such a belief does not entitle the holder to conscientious objector status under the statute. *E.g.*, *United States* v. *Spiro*, 384 F. 2d 159 (C.A. 3), certiorari denied, 390 U.S. 956.[5]

2. Petitioner contends that Negroes were systematically excluded from the local and state appellate boards which passed upon his claims, and that this consideration should serve to nullify their decisions to classify him I-A and thus necessitates reversal of his conviction. This contention was properly rejected by

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[5] Petitioner raises a separate contention (Pet. 3) that the inclusion in the Selective Service file of letters and newspaper clippings unfavorable to him, and statements of General Hershey and Congressman Rivers, deprived him of due process in the determination by the Selective Service System of his conscientious objector and ministerial exemption claims. This contention is without merit for the reasons enumerated by the court of appeals (Pet. App. 48a, n. 23). There is no showing that any of the material or statements had the slightest influence on the Selective Service boards' determinations. See *Marcello* v. *Bonds*, 349 U.S. 302, 311-313.

the court below, which gave it extended consideration (see Pet. App. 12a-23a).[6]

The Universal Military Training and Service Act (50 U.S.C. App. 460(b)(3)), authorizing the President to establish local and appellate Selective Service boards, provides that:

> * * * Each local board shall consist of three or more members to be appointed by the President from recommendations made by the respective governors or comparable executive officials. * * * No member of any local board shall be a member of the armed forces * * *, but each member * * * shall be a civilian who is a citizen of the United States residing in the county or political subdivision * * * in which such local board has jurisdiction * * *. * * * Appeal boards within the Selective Service System shall be composed of civilians who are citizens of the United States and who are not members of the armed forces. The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President. The President, upon appeal or upon his own motion, shall have power to determine all claims or questions with respect to inclusion for, or exemption or deferment from training and service under this title * * *, and the determination of the President shall be final.

Moreover, Selective Service regulations provide that an appeal board shall normally consist of five members and that (32 C.F.R. 1604.22):

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[6] It shouuld be noted that the decision in the instant case on this point has recently been followed by the Second Circuit in *United States* v. *Prince*, No. 477 (C.A. 2, decided July 19, 1968).

> [It] should be a composite board, representative of the activities of its area, and as such should include one member from labor, one member from industry, one physician, one lawyer, and, where applicable, one member from agriculture.

All members of local and state appeal boards serve without compensation (32 C.F.R. 1603.3). The regulations also provide for the creation of a National Selective Service Appeal Board appointed by the President, which exercises the powers bestowed upon the Chief Executive by 50 U.S.C. App. 460(b)(3). By explicit regulation, the Presidential Appeal Board is independent of the Director of Selective Service (32 C.F.R. 1604.6(c)).

According to the Report of the National Advisory Commission on Selective Service,[7] submitted in February 1967, .2% of the local board members in Kentucky were Negro, as compared with a 7.1% Negro population, and 1.1% of local board members in Texas were Negro, as compared with a 12.4% Negro population (see Report, pp. 80-81). No member of a local or state appeal board which determined petitioner's Selective Service classification was a Negro.[8] One of

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[7] That report is part of the record of proceedings below (D. Exh. 1), and a copy of it is on file with the Clerk of this Court.

[8] On March 9, 1967, at a press conference, the President stated, when asked about the Report of the National Advisory Commission on Selective Service: "Unquestionably, in the field of the Selective Service boards and the draft machinery, as in the general machinery of Government at all levels, there has been discrimination against minority groups. I will do all I can to see that that is corrected. I don't believe

the three members of the Presidential Appeal Board, however, was a Negro.

Petitioner argues that local and appellate Selective Service boards are analogous to juries, whose verdicts may be set aside on a showing of systematic exclusion of an identifiable group or class made by a member of the group or class discriminated against in the jurors' selection. *E.g.*, *Hernandez* v. *Texas*, 347 U.S. 475. He urges that the dearth of Negroes on the local and appellate boards which determined his I-A classification should be accepted as proof of a systematic exclusion of Negroes from service on such boards, just as statistical evidence of gross underrepresentation of Negroes on a jury roll has been held to constitute prima facie proof of discrimination in the method of selection. See *Whitus* v. *Georgia*, 385 U.S. 545. The suggested analogy, however, is inapt.

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our people want to see that happen or want to see that continued."

On March 6, 1967, the Chief Executive had informed Congress that: "I am instructing the Director of the Selective Service to: * * * In conjunction with Governor Farris Bryant, Director of the Office of Emergency Planning to work with the governors to assure that all local boards are truly representative of the communities they serve and to submit periodic reports on the progress in this area." See Weekly Compilation of Presidential Documents, March 13, 1967, p. 395, on file with the Clerk of this Court.

By May 31, 1967, the President was able to advise a meeting of the state directors of the Selective Service System that they and General Hershey, working with the governors, had achieved "some progress" in making local boards more representative. See Weekly Compilation of Presidential Documents for the week in question, pp. 698-699, on file with the Clerk of this Court (see also Pet. App. 16a-17a).

The right to a trial in a criminal case by a jury chosen from a cross-section of the community is guaranteed by the Constitution. A large part of the community has the right and the duty to serve on juries. A gross imbalance of a particular race or class on a jury roll is thus strong evidence that the constitutional mandate for a jury representing a fair cross-section of the community has not been followed.

In contrast, the members of local and appellate Selective Service boards are selected by the President, on recommendation of the state governors. The number who serve is, by comparison to the number serving on juries, very small. The limited numbers involved and the fact that presidential discretion, rather than random lottery, is involved in the selection procedure renders reliance on statistics as a basis for showing racial prejudice unwarranted. Moreover, the selection effort is presumably at least partially directed toward finding the most qualified individuals for service on Selective Service boards, rather than picking by lot from among a group of persons who merely meet minimum requirements for such service. This is particularly true of appointments to the appeal boards which are designed to be representative as to a number of *activities* (*i.e.*, business, medicine, law, and agriculture) in which Negroes are, at present, greatly underrepresented.[9]

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[9] This is less true of appointments to the local boards, which the President has indicated are intended to be representative of the community as a whole (see note 8, *supra*). However, since all Selective Service registrants who are in a position to attack their classifications as a defense to a criminal prose-

To show systematic exclusion of a racial group where executive discretion in appointment has been exercised would, therefore, require calling the particular executive official as a witness and compelling him to testfy (or the equivalent by other forms of legal process) as to his reasons for selecting various individuals and rejecting others. Under the doctrine of separation of powers, such an inquiry would be wholly inappropriate—particularly where the presidential appointment power is involved and the judicial inquiry would focus on an alleged lack of integrity in the exercise of executive power. See *United States* v. *Morgan*, 313 U.S. 409, 422. It is for this same reason that petitioner's ancillary contention (Pet. 14-15) regarding the denial of his various applications for subpoenas and discovery is without merit (see Pet. App. 24a-28a).

The court of appeals, apparently acting on the assumption, *arguendo*, that systematic exclusion of Negroes from petitioner's local and state appeal boards had been proved, concluded that "a draft board system which does not have a sufficiently representative number of Negro members is comparable to a malapportioned legislature [the acts of which] are not invalid" (Pet. App. 19a). Since the court was attempting, in

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cution must have appealed their classification to their appeal board (see *Estep* v. *United States*, 327 U.S. 114, 123; *Falbo* v. *United States*, 320 U.S. 549, 552-553), which makes a *de novo* determination (see Pet. App. 21a-22a), even an assumed prejudicial composition of a registrant's local board would seem irrelevant to his conviction for a failure to obey an order to submit to induction.

our view, only to analogize the legal effect of the actions of the two bodies—as *de facto* in nature—and not their functions, we do not disagree. In terms of their functions and structure, however, Selective Service boards seem to us more akin to administrative agencies than to either legislatures or juries. Although their members serve without pay, such boards are nonetheless official bodies and service on them is a public office. The functions performed by the local and appeal boards in determining a registrant's proper classification under the Universal Military Training and Service Act are comparable to those performed by other agencies which administer particular congressional enactments. Challenges to the composition of such agencies, or to individual members thereof, are permissible only on grounds of personal bias or prejudgment. See *Accardi* v. *Shaughnessy*, 347 U.S. 260; *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 700-703.[10] Here there was no showing of bias or prejudgment. As the court of appeals found (Pet. App. 23a):

> There are conclusory allegations that the absence of Negroes from local and appeal boards (other than the Presidential Appeal Board) in and of itself establishes discrimination. But we have been unable to find any evidence which shows in the slightest particular that the treatment accorded Clay (Ali) by any board or member thereof was different from that given to any other registrant.

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[10] Compare, as to federal judges, 28 U.S.C. 144, 455.

In any event, as the court below held, any defect in the process of petitioner's classification by the local and appeal boards resulting from the absence of Negroes thereon was cured by the action of the Presidential Appeal Board. Like the state appeal boards, the determination by the Presidential Appeal Board is based upon a *de novo* examination of the registrant's Selective Service file. See Note, *The Selective Service*, 76 Yale L.J. 160, 172 (1966). Review by that board, on which there was no racial imbalance, thus superseded all prior classifications and established the validity (as against the present argument) of petitioner's I-A classification. See *Falbo* v. *United States*, 320 U.S. 549, 555 (Rutledge, J., concurring); *DeRemer* v. *United States*, 340 F. 2d 712, 719 (C.A. 8); *Cramer* v. *France*, 148 F. 2d 801, 804-805 (C.A. 9); *United States* v. *Chodorski*, 240 F. 2d 590 (C.A. 7), certiorari denied, 353 U.S. 950.[11]

[11] Petitioner's further contention that his classification as I-A and conviction for failure to submit to induction constituted a bill of attainder (Pet. 3) was amply answered by the court of appeals' discussion of this point (see Pet. App. 41a-48a), and petitioner places little reliance presently on that claim.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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